No. 15,584

United States Court of Appeals

For the Ninth Circuit

CHANAN DIN KHAN,
Appellant,

vs.

BRUCE G. BARBER, District Director, United States Immigration and Naturalization Service,
Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

JURISDICTIONAL STATEMENT.

Appellant by his complaint sought review of the final order of the Immigration and Naturalization Service that appellant is a deportable alien. He asked the Court to declare the order void and to enjoin appellee from executing it. Appellant was not in the custody of appellee at the time the complaint was filed.

The Supreme Court of the United States has held that judicial review of the proceedings of the Immi-

gration and Naturalization Service may be effected by remedy other than habeas corpus.

Shaughnessy v. Pedreiro, 349 U.S. 48;
Marcello v. Bond, 349 U.S. 302.

The Court of Appeals has jurisdiction of appeals from all final decisions of the District Courts under 28 U.S.C. 1291.

FACTS.

Appellant entered the United States unlawfully at some time prior to 1924 by deserting from an unidentified vessel upon which he was employed as a seaman. In 1949 he applied for adjustment of his status. The application was granted on August 28, 1948.

On January 25, 1952, after trial before a jury, appellant was convicted on an indictment in two counts charging him with violation of section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. 145(b).

The first count charged:

> "That on or about the 15th day of March, 1947 . . . Chanan Din Khan . . . did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue District of California, at San Francisco, California, a false and fraudulent income tax return wherein he stated that his net

income for said calendar year was the sum of $2,325.80 and that the amount of tax due and owing thereon was the sum of $24.00, whereas, as he then and there well knew, his net income for the said calendar year was the sum of $12,433.42, upon which said net income he owed the United States of America an income tax of $2,664.47."

The second count charged violation of Section 145(b) for the calendar year 1947 by stating his net income was the sum of $157.15 and that no tax was due and owing thereon, whereas his net income for 1947 was $9,319.16—otherwise the wording of the second count was identical to the first count.

By order of the District Director of Immigration and Naturalization Service at Los Angeles, dated January 4, 1954, the Certificate of Registry adjusting appellant's status was rescinded on appeal. Said order was affirmed April 1, 1954.

An Order to Show Cause was served on appellant on May 2, 1956 and at the hearing in accordance with 8 U.S.C. 1252(b) appellant was found deportable on the charge contained in the Order to Show Cause, to wit:

"Section 241(a)(4) Immigration & Nationality Act. (8 U.S.C. 1251(a)(4) convicted of two crimes involving moral turpitude.

Violation of 26 U.S.C. 145(b), Income tax evasion, two counts, for the years 1946 and 1947. An appeal to the Board of Immigration Appeals was dismissed on August 31, 1956."

The complaint herein was filed on September 27, 1956 and the Judgment from which this appeal was noted was entered February 20, 1957.

QUESTION PRESENTED.

Appellant states two questions:

(1) Does appellant's conviction at a single trial, on one indictment of two separate counts charging violation of 26 U.S.C. Section 145(b), for the years 1946 and 1947, constitute two crimes within the meaning of 8 U.S.C. 1251(a)(4);

(2) Does the conviction on the two counts under 26 U.S.C. 145(b) as charged in the indictment constitute a conviction of two crimes involving moral turpitude within the meaning of 8 U.S.C. 1251(a)(4).

Appellee fails to detect a third issue concerning a "sufficiently definite standard" not contained within the two stated questions.

STATUTES.

Internal Revenue Code of 1939, as amended: 26 U.S.C. Sec. 145(b):

> "Failure to collect any pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who will-

fully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

26 U.S.C. Sec. 3616(a):

"Whenever any person——

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or

(b) Neglect to obey summons. Being duly summoned to appear to testify, or to appear and produce books as required under section 3615, neglects to appear or to produce said books—— He shall be fined not exceeding $1000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Public Law 414, Act of June 27, 1952, 66 Stat. 163:
Section 241(a)(4), 8 U.S.C. 1251(a)(4):

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who——

* * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for

a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

ARGUMENT.

A. APPELLANT WAS CONVICTED OF TWO CRIMES AT A SINGLE TRIAL.

Appellant concedes that the conviction of two crimes may occur at a single trial. His contention is that the two crimes charged in the two counts in the indictment upon which he was convicted involve a single scheme of criminal misconduct and that, therefore, he was not convicted of two crimes within the meaning of Sec. 241(a)(4).

Appellant makes no attempt to support his contention by reference to facts contained in the record. On the contrary, he asks the Court to assume (Brief p. 4) "for purposes of argument only" that appellant in 1946 "hit upon a plan". A second assumption occurs at this point, in that appellant assumes by using the word "plan" he has necessarily included all the essential facts from which a Court may conclude the existence of a single scheme resulting in a multiple offense.

There is no question that a single scheme or plan may result in a multiplicity of crimes, but the existence of the single scheme is not established by assumption.

The crime denounced by Sec. 145(b) is complete when the taxpayer wilfully and knowingly files a false and fraudulent return with intent to defeat or evade any part of the tax due the United States.

United States v. Croessant, (3rd Cir.) 178 F. 2d 96, 98 cert. den. 339 U.S. 927;

Cave v. United States, (8th Cir.) 59 F. 2d 464;

Myres v. United States, (8th Cir.) 174 F. 2d 329, 334 cert. den. 338 U.S. 849.

An attempt to evade income tax is a separate offense for each year.

United States v. Sullivan, (2nd Cir.) 98 F. 2d 79, 80;

Norwitt v. United States, (9th Cir.) 195 F. 2d 127 cert. den. 344 U.S. 817;

United States v. Stoehr, (3rd Cir.) 100 F. Supp. 143, 159 aff. 196 F. 2d 276 cert. den. 334 U.S. 826;

United States v. Johnson, (7th Cir.) 123 F. 2d 111, 119 reversed on other grounds 319 U.S. 203.

Several separate offenses may be committed during the execution of one plan. However, appellant's citation of *Norwitt v. United States,* 195 F. 2d 127, in support of the proposition that several successive abortive attempts to assassinate the President of the United States would result in many crimes, but only one plan or scheme is inaccurate and misleading.

In *Norwitt, United States v. Johnson,* 123 F. 2d 11, was cited in support of the contention

> "while there may be such a crime in each year * * * once the attempt has been consummated by the filing of a false and fraudulent return in any particular year, the offense has been completed for that year * * *"

The Court said p. 133,

> "The sole case cited to support this remarkable proposition is *U. S. v. Johnson* * * *. That decision, however, is not at all in point. In that case the first four counts of the indictment charged the same offense except *for different years.* In the light of those facts, the Court correctly said 'an attempt to evade income tax is a separate offense for each year.' That is a far cry from saying that *several* such separate offenses may not be committed for the same year."
>
> "The appellant's argument may be reduced to an absurdity. A man attempts to assassinate the President of the United States on January 1, 1952. He escapes arrest and tries the same thing the next day. He keeps up this record of poor marksmanship and swift flight for every one of 366 days of the year. Is he guilty of one attempt against the President's life—or of 366?"

The absurdity of the argument, of course, is that there are obviously 366 attempts. But there are also 366 plans. There would probably be a single purpose or theme—assassination—but a new plan would be required with each attempt.

Appellant's so-called "common sense test" (Brief p. 5) is also inaccurate and misleading. Admissibility of the evidence of the crime in the first count in the

prosecution of the second count, provides no such test in that the theory is not whether there was plan or scheme, but rather was there an *intent* or *motive* since the crime is one in which the state of mind is an element.

U. S. v. Fawcett, (3rd Cir.) 115 F. 2d 764, 768;
Neff v. U. S., (8th Cir.) 105 F. 2d 688;
Hoyer v. U. S., (8th Cir.) 233 F. 2d 134;
U. S. v. De Silvestro, 147 F. Supp. 300.

Appellant has carried this inaccuracy into a false conclusion in the second paragraph on page 5 of the brief. He says:

> "It is true that ordinarily evidence of other crimes is not admissible to prove that the crime charged has been committed, but if there existed a common plan or scheme, an exception is made. It follows that evasion of income taxes for the year 1946 by understating the net income and evasion of 1947 taxes by the same method represents but one scheme or plan."

The conclusion is founded upon the undisclosed false premise—"all crimes in the prosecution of which evidence of other crimes is admissible have but one scheme or plan." The essential common ingredient in the offense is the *intent to evade* regardless of how many plans or schemes may be involved. And so with appellant here his purpose in each count was to evade the taxes by filing a false and fraudulent tax return. The vital element of the offense under 145(b) is *by wilful attempt in any manner to evade or defeat any tax.* Appellant was convicted for each violation. There

is nothing to support any assumption of a single scheme covering the two years. The single consistent *theme* not "scheme" is the intent of appellant to evade paying his taxes.

B. VIOLATION OF 145(b) AS CHARGED IN THE INDICTMENT IS A CRIME INVOLVING MORAL TURPITUDE.

This Court in the case of *Tseung Chu v. Cornell,* No. 15344, July 11, 1957, has established the rule of the Ninth Circuit Court of Appeals.

> "We follow the rule laid down in the DeGeorge case, supra, and Bloch v. U. S. supra (1955), that an intent to defraud the Government is a prerequisite to conviction under Section 145(b)[6] and hence, a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude."

Footnote 6 states:

> "This same rule was followed in this Circuit by a recent District Court case. (*Chanan Din Khan v. Barber,* 147 F. Supp. 771, at page 775) which relied (in Note 5) on, . . ."

Note 5 of the Opinion of the Court below is found at page 15 of the Transcript.

Each Count of the indictment charges appellant "did wilfully and knowingly attempt to defeat and evade . . . income tax . . . by filing and causing to be filed a false and fraudulent income tax return."

Appellant at page 8 of the brief concedes:

> "If an intent to defraud is an essential element of the crime, then it involves, necessarily, moral turpitude. *United States v. Day,* supra."

Appellant then continues in the next paragraph of his brief to say:

> "It is now the conclusively settled law of the land that a violation of Section 145(b) of the United States Internal Revenue Code does not necessarily involve fraud or moral turpitude. *United States v. Scharton,* 285 U.S. 518, 52 S. Ct. 416."

Appellant then says:

> "It is difficult to reconcile the *Scharton* case, supra, with the ruling of this Court in *Chu v. U. S.,* July 11, 1957 (not yet reported)."

Appellee does not agree with appellant that "it is now the conclusively settled law of the land that a violation of Section 145(b) . . . does not necessarily involve fraud or moral turpitude." *United States v. Scharton* does not establish any such principle.

The *Scharton* case was concerned with Section 1114(b) of the Revenue Act of *1926*, and the applicability of the three or six-year limitation contained in Section 1110.

Section 1114 had three parts:

> (a) Made "willful failure to pay taxes, to make a return, to keep necessary records or to supply requisite information" a misdemeanor.

(b) Made a "willful attempt, in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony."

(c) Made "willfully aiding, assisting, procuring, counseling, or advising preparation or presentation of a false or fraudulent return, affidavit, claim or document" a felony.

The Supreme Court in *Scharton* said, page 521:

"There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Section 1114(b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat."

The Court, therefore did not apply the six-year period of the statute of limitations, starting page 522:

"The purpose of the proviso is to apply the six-year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.' "

The *Scharton* case was decided April 11, 1932. Congress promptly thereafter on June 6, 1932 in Public Law 154, Revenue Act of 1932, 47 Stat. 169, Sec. 1108, at page 288, reenacted Section 1110 of the Revenue Act of 1926, to make the six-year statutory period applicable to 1114(b) offenses.

More definitive of the nature of the crime is the case of *Spies v. U. S.,* 317 U.S. 492. The petitioner

had been convicted of attempting to defeat or evade income tax in violation of Section 145(b). Section 145(a) made willful *failure to pay* a tax or *make a return* a misdemeanor. Sec. 145(b) made a willful attempt in any manner to *evade* or *defeat* any tax a felony. Petitioner had requested an instruction to the effect that the jury could find him not guilty of a willful attempt to defeat or evade the tax if they found that he had only willfully failed to make a return and willfully failed to pay the tax.

Beginning at page 496, the Court discusses the sanctions contained in the Revenue Code applicable to violation. Attention is called particularly to the following, at page 496:

> "If any part of the deficiency is due to negligence or intentional disregard of rules and regulations but without intent to defraud, four percent of such deficiency is added thereto, and if any part of any deficiency is due to fraud with intent to evade tax, the addition is 50 percent... Willful failure to pay the tax when due is punishable as a misdemeanor. Sec. 145(a). The climax of this variety of sanctions is the serious and inclusive felony defined to consist of willful attempt in any manner to evade or defeat the tax. Sec. 145(b)."

Referring to willfulness in relation to a knowing and intentional default in payment, the Court at page 498 said:

> "We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

And again on page 498:

> "The difference between the two offenses (145(a) and 145(b)), it seems to us is found in the affirmative action implied from the term 'attempt' as used in the felony subsection . . . This (145(b)) is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation as would be the case say, of attempted murder . . . We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omission that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine it with a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony."

See also

Screws v. U. S., 335 U.S. 91.

Certainly the additional, factor "positive" in nature involves "moral turpitude."

In the *Chu* case, supra, this Court looked to the Supreme Court "in the leading case of *Jordan v. De George,* 341 U.S. 223 (1951), 71 S. Ct. 203, 95 L. Ed. 886" as the controlling authority, and from page 227 quoted the following:

> "Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude . . . In every deportation cases where fraud has been proved,

federal courts have held that the crime in issue involved moral turpitude. This has been true in a variety of cases . . ."

As in the *Chu* case, appellant herein was indicted and convicted of willfully and knowingly attempting to evade income taxes by filing and causing to be filed a *false* and *fraudulent in*come tax return. He was convicted of a crime involving moral turpitude.

Appellant in the *Chu* case filed a petition for certiori in the Supreme Court on October 4, 1957, docket number 530. (26 L.W. 3120.)

Such concern as appellant may indicate on page 10 over the difference or lack thereof, between Sections 145(b) and 3616(a) of the 1939 Revenue Code, would appear to be completely resolved by the Supreme Court decision in *Achilli v. United States,* 353 U.S. 373, May 27, 1957. The Court concluded that "3616(a) did not apply to evasion of income tax."

CONCLUSION.

The Court's attention is called to the quotation in the *Chu* case, from the District Court's Opinion, page 6, in this case:

"In *Chanan Din Khan v. Barber,* 147 F. Supp. 771 (1957) the same matter was at issue. There the District Court found that a violation of Section 145(b) is a crime involving moral turpitude . . . the courts have, with apparent unanimity, held that in order for a conviction under Section 145(b) to stand, the Government is required to

> prove that the evading taxpayer had a specific intent to evade *taxation, amounting to an intent to defraud* the United States. (Emphasis by the Court.) Fraud is so inextricably woven into the term 'willfully' as it is employed in 145(b) that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached."

It is respectfully submitted that the judgment of the Court below should be affirmed.

Dated, San Francisco, California,
October 31, 1957.

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